Editor's note: 83 I.D. 556

LEONARD R. MCSWEYN

IBLA 76-606 Decided November 15, 1976

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting oil and gas lease offer M 33933.

Affirmed as modified.

1. School Lands: Generally--School Lands: Indemnity Selections

A State is entitled to indemnity for school lands which it did not acquire by reason of a fractional township. Where the fractional township is created by reason of the incursion of a navigable body of water, the State, by taking indemnity does not thereby grant to the United States the bed of the navigable body of water.

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2. Navigable Waters--State Lands

The States possess dominion over the beds of all navigable streams within their borders.

3. Oil and Gas Leases: Lands Subject to--Navigable Waters --State Lands

An oil and gas offer embracing land in the bed of a navigable river, which is State land, is properly rejected.

APPEARANCES: Leonard R. McSweyn, Shepherd, Montana, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Leonard McSweyn appeals from a decision dated April 13, 1976, rendered by the Montana State Office, Bureau of Land Management (BLM), rejecting his oil and gas offer M 33933.

The decision below recited in pertinent part as follows:

Noncompetitive oil and gas application M 33933 describes by metes and bounds a portion of the bed of the Yellowstone River adjacent to upland in Sec. 36, T. 23 N., R. 59 E., P.M.M.

It is true as set forth in IL List No. 40 the State of Montana did use the bed of the Yellowstone River as deficiency base for lieu selection. It is also true that for this deficiency base, among other base lands, the State of Montana selected the NE/1/4 and E/1/2 SW/1/4 Section 11 in T., 4 S., R. 55 E., P.M.M. and to which they received title with no minerals reserved by the federal government. This we do not feel is the governing factor, but instead whether or not the Yellowstone River was navigable when the state entered the Union on November 8, 1889.

The question of navigability of the Yellowstone River has arisen many times and we have consistently held it was navigable from Billings downstream to its confluence with the Missouri. This being so, title to the bed of the river passed to the State of Montana upon the admission to the Union. The United States therefore owns no minerals and cannot issue an oil and gas lease.

Accordingly, your application is rejected in its entirety.

The appeal in pertinent portion states:

By decision, dated April 13, 1976, 943.1: M33933, the Montana State Office rejected my Oil and Gas Application describing the bed of the Yellowstone River invading Section 36, Township 23 North, Range 59 East, P.M.M.

The State of Montana received title to all of the surveyed in place land in the above identified Section 36. Further, they used the bed of the river as base for Lieu Selection as evidenced by IL List No. 40. The United States did not reserve the minerals on Lieu Land selected by the State of Montana.

I agree the Yellowstone River was navigable where it invades Section 36, T. 23 N., R. 59 E., in 1889, which is the year Montana was admitted to the Union. This however, has no bearing on the decision at hand. The Interior Board of Land Appeals clearly held in David A. Provinse [sic], 15 IBLA 387 (IBLA 74-39, May 28, 1974),

> that where the State has used the bed of a body of water as base for lieu selection the United States owns the minerals underlying that body of water. That is exactly the situation we have for the case at hand.

[1] The right of a State to select public land as indemnity for losses in a fractional township of specific sections named in a grant of school lands to the State is measured by the acreage to which it is entitled computed in accordance with REV. STAT. § 2276, 43 U.S.C. § 852 (1970), less the acreage of the school lands in place in the fractional township. State of Utah, 68 I.D. 53, 55 (1961). It necessarily follows that the State is entitled to indemnity for lands which it owns other than potential school lands, in the school sections, i.e., 16 and 36.

Section 10 of the Act of February 22, 1889, 25 Stat. 676, 679, provides as follows:

> Sec. 10. That upon the admission of each said States [Montana, North Dakota and South Dakota] into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations

for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain.

REV. STAT. 2275 (1878), as amended by the Act of February 28, 1891, 26 Stat. 796, provided:

SEC. 2275. Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. * * * [Emphasis supplied.]

It is clear that the statute draws a dichotomy between lands lost through prior appropriation and those lost through a "short" township. Obviously, it is only in the former case that claim to the "lost lands" title is given up by the State; in the latter case, the statute envisages no such action.

List No. 40 for the Miles City, Montana Land District, approved August 17, 1922, shows that an indemnity selection was granted on the basis of a deficiency in a fractional township, i.e., T. 23 N., R. 59 E. It follows that the State gave up no rights to the lands in that township by making the indemnity selection. Provinse, cited by appellant, is not controlling in the case at bar since it involves a nonnavigable lake.

[2] As BLM held, the State of Montana was vested with title to the bed of navigable rivers. Both BLM and appellant concede that the portion of the Yellowstone River in issue is navigable.

By a long-standing doctrine of constitutional law the States possess dominion over the beds of all navigable streams within their borders. Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Shively v. Bowlby, 152 U.S. 1 (1894). The shores of navigable waters and the soils under them were not granted by the Constitution of the United States, but were

reserved to the States respectively; and the new States, e.g., Montana, have the same rights, sovereignty, and jurisdiction over this subject as do the original States, Pollard v. Hagan, supra (headnote 3).

[3] It necessarily follows that an oil and gas offer embracing land underlying the navigable waters of a State must be rejected. Rayford W. Winters, A-28125 (January 15, 1960).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Frederick Fishman
Administrative Judge

I concur:

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Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

Appellant's argument in this appeal rests upon a contention that the State, by taking indemnity based on fractional sections, has waived or conveyed its title to the bed of the navigable river to the United States. He rests his argument upon the case of David A. Provinse, 15 IBLA 387,
81 I.D. 300 (1974), which held that where a State had selected other lands in lieu of lands lying within the meander line of a nonnavigable lake adjacent to granted upland school sections, it relinquished any interest in the land underlying the lake and within the meander line, citing United States v. Oregon, 295 U.S. 1, 10-11 (1935). The deficiency involved in the Oregon case pertained to the unsurveyed lake bed lands within the meander lines. The lake was held to be nonnavigable. Whatever title the State may have originally had to the lake bed was by virtue of its school land grant for the adjoining upland and the riparian rights which flowed from that grant.

As to the bed of a navigable body of water, such as in the case before us, the State's original title stems from the rule that "* * * title to lands underlying navigable waters presumptively passes to the State upon admission to the Union * * *." United States v. Oregon, Id. at 27. This is a consequence of

the State's sovereignty and not because the lands are included in or are incident to a grant of adjoining uplands for school purposes. Id. at 14.

A waiver of title to the United States when a State obtains indemnity in lieu of granted lands is provided for by R.S. 2275, as amended by the General Indemnity Act, of February 28, 1891, 26 Stat. 796, which provides in pertinent part:

> SEC. 2275. Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. * * * [Emphasis added.]

The first sentence in the proviso underlined in the quotation above was modified by the Act of August 27, 1958, 72 Stat. 928. The statute, codified as 43 U.S.C. § 851 (1970), now provides:

> * * * That the selection of any lands under this section in lieu of sections granted or reserved to a State or Territory shall be a waiver by the State or Territory of its right to the granted or reserved sections. * * *

The waiver provision under the 1891 Act expressly referred to mineral land and land within reservations. The 1958 amendment broadened the waiver to the "selection of any lands under this section in lieu of sections granted or reserved to a State or Territory." The indemnity selection in this case was in 1922. Therefore, the 1891 Act controls the effect of the State's selection. It would not seem that the waiver provision was applicable to the beds of the navigable bodies of water in this case in any event, since they do not appear to come within the categories listed under the 1891 Act. Further, it appears the indemnity provisions were for school land sections and not for lands underlying navigable bodies of water which the State took by virtue of its sovereignty.

A question could be raised as to the effect of the 1958 Act. Namely, whether the broadened waiver provision of that Act may be considered as applicable to any lands for which

indemnity may be obtained, or as making a condition for a State to obtain indemnity irrespective of whether the State's title to the bed of land underlying water was by virtue of the fact the water is a navigable body of water, or as an incident to the State's title to adjoining uplands of a nonnavigable body of water in a fractional section of land, as in Provinse and Oregon, supra. This question need not be answered here.

I believe it is sufficient to rest our rejection of appellant's offer upon appellant's failure to show adequately that title to the land in this case rests in the United States. Where there is uncertainty of title, the Secretary of the Interior, in his discretion, may refuse to issue an oil and gas lease for that reason. Forest Oil Corp., 15 IBLA 33 (1974).

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Joan B. Thompson
Administrative Judge